STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 21, 2010

In re CNS/JLM, Minors.

No. 297298
Van Buren Circuit Court
Family Division
LC No. 09-003941-AM

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Petitioner appeals as of the right the trial court's order, which denied her motion pursuant to MCL 710.45(2), to determine whether the decision by respondent Michigan Children's Institute (MCI) to withhold consent to adoption was arbitrary and capricious. We affirm.

First, petitioner claims that respondent's decision to deny consent to adoption was arbitrary and capricious, and that the trial court's affirmance of that decision was clearly erroneous. A person who has filed a petition to adopt a state ward and has not received consent from the MCI may move the family court to challenge the MCI superintendent's denial of consent. MCL 710.45(2); *In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008). A trial court must affirm a decision by the MCI Superintendent to withhold consent to adoption unless there is clear and convincing evidence that such a decision was arbitrary and capricious. *In re Cotton*, 208 Mich App 180, 184; 526 NW2d 601 (1994). In this context, the determination whether the trial court properly applied the above standard is a question of law reviewed for clear legal error. *In re Keast*, 278 Mich App at 423.

Our review of this case focuses on the reasons given by MCI Superintendent William Johnson for withholding the consent to adoption, and not on what reasons existed to authorize the adoption. *In re Cotton*, 208 Mich App at 185. The MCI Superintendent articulated his concerns in withholding consent to adoption from petitioner: petitioner's alleged marijuana and alcohol use, her failure to adequately supervise the children, the unsubstantiated Children's Protective Services (CPS) allegations, and her past criminal history. The MCI Superintendent explained at the motion hearing that the existence of such allegations warranted consideration under these circumstances regardless of the truth or falsity of the aforementioned allegations. It was the fact of the allegations along with all of the other evidence related to the children's adoption that led to the withholding of consent from petitioner to adopt.

Here, the MCI Superintendent expressed good reasons to support his decision; thus, his decision to withhold consent to adoption was not arbitrary and capricious. *Id.* ("[I]t is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that

indicates that the representative was acting in an arbitrary and capricious manner.") While the MCI Superintendent did not interview petitioner during the investigation, her explanations to the various allegations were contained in the relied upon reports. Petitioner's testimony at the motion hearing generally comported with her previous statements to investigators and caseworkers. Contrary to petitioners' claim on appeal, the record reflects that the MCI Superintendent reviewed the detailed reports by the relevant agencies' staff members, as well as documentation submitted by petitioner's counsel, before making the ultimate decision. See *id.* at 186. The MCI Superintendent was not required to conduct an independent investigation in this matter; rather, the MCI superintendent does not act arbitrarily or capriciously by rendering a decision based on the evidence collected during the course of an investigation in such a matter. *Id.* Under MCL 710.45, the focus of the hearing was not whether the MCI Superintendent made the "correct" decision, or whether the trial court would have decided the issue differently, nor was it an opportunity for petitioner to make a case relative to why the consent should have been granted. *In re Keast*, 278 Mich App at 435 n 10. Ultimately, petitioner failed to carry her burden by establishing by clear and convincing evidence that Johnson's decision was arbitrary and capricious. *In re Cotton*, 208 Mich App at 184. As such, we conclude that the trial court's decision to deny petitioners' motion to review the MCI Superintendent's decision was not clearly erroneous. *In re Keast*, 278 Mich App at 423.

In reaching a conclusion, petitioner injects some additional arguments: (1) that respondent, in denying consent to adoption, somehow corrected the Department of Human Services' mistake in placing children with petitioner; (2) that the trial court improperly excluded the May 30, 2008, CPS report from evidence; and (3) that the guardian ad litem (GAL) was not informed of the removal of the children from petitioner's residence. We conclude that none of these arguments warrant reversal. First, there is no evidence to support a conspiracy theory as suggested by petitioner on appeal. Second, while the CPS report may have been admissible below, the record demonstrates that petitioner's counsel only sought to impeach the MCI Superintendent by using that report, and the trial court would have permitted her to do so. However, petitioner's counsel changed course during the remainder of her examination of the MCI Superintendent and did not further question the superintendant. More importantly, counsel indicated agreement with the decision not to admit the report. We thus reject this claim of error, where "[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). Third, while the GAL claimed that he did not know that the children had been removed from petitioner's residence for two months, there is no indication that the MCI Superintendent had anything to do with that removal decision, and it has no bearing on whether the withholding of consent was arbitrary and capricious.

Next, petitioner complains that the trial court improperly relied on the doctrine of anticipatory abuse or neglect as set forth in *In the Matter of Dittrick Infant*, 80 Mich App 219; 263 NW2d 37 (1977), to affirm the MCI Superintendent's decision to deny consent to adoption. This allegation of error has no merit. The trial court used the correct legal standard, and it did not commit clear legal error. *In re Keast*, 278 Mich App at 423.

In its written ruling, the trial court extensively discussed petitioner's past. Some of the discussion may have been outside the purview of the trial court's review, where it addressed

petitioner's social history, a topic not specifically addressed in the MCI Superintendent's decision. *In re Cotton*, 208 Mich App at 184 (the trial court does not engage in de novo review of the MCI Superintendent's decision). Nevertheless, the trial court considered that part of petitioner's history that the MCI Superintendent found significant in denying consent to adoption: her issues with alcohol, the CPS allegations, and her criminal history. In doing so, the trial court commented that "[a]lthough not infallible, the past is one of the best predictors of the future," citing *In the Matter of Dittrick Infant*, 80 Mich App 219. In that case, this Court addressed whether the plaintiff, a social services agency, could take temporary custody of the defendants' unborn child. *Id.* at 221. The plaintiff sought to take temporary custody of the defendants' unborn child, because the defendants' parental rights were terminated for abusing their first child. *Id.* The probate court awarded the plaintiff temporary custody of the unborn child; the circuit court dismissed defendants' appeal. *Id.* at 221-222. This Court rejected the defendants' argument on appeal that evidence of abuse of one child could not be used as evidence of potential abuse of another child, i.e. doctrine of anticipatory abuse or neglect. *Id.* at 222.

In this case, there is no indication that the trial court used *In the Matter of Dittrick Infant*, as the legal basis to affirm respondent's decision. The trial court merely cited that case as a transitional sentence from finding that petitioner's "overwhelmingly negative" past outweighed her purported recent progress to the trial court's ultimate conclusion that the MCI Superintendent's decision was not arbitrary and capricious.

Petitioner also argues on appeal that the trial court failed to give any consideration to her substance abuse assessment or her recent changes to improve her life. While these complaints amount to an improper request for de novo review of the MCI Superintendent's decision, *In re Cotton*, 208 Mich App at 184, the trial court received evidence related to petitioner's substance abuse assessment and character references regarding her personal growth, and afforded that evidence whatever weight it deemed appropriate in making its ruling. We, therefore, reject this allegation of error.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray